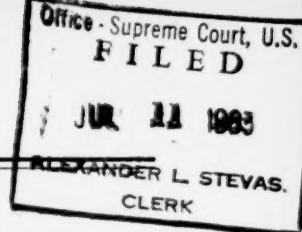


83-51

No.



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

BONDED ELEVATOR, INC. and
FRANK CORUM, Executor of the
Estate of Deceased Otto Corum - - Petitioners

versus

FIRST AMERICAN NATIONAL
BANK OF NASHVILLE - - Respondent

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals depart from the accepted and usual course of judicial proceedings and deny petitioners due process of law by:

A. Refusing to certify to the Kentucky Supreme Court the determinative question of state law when the identical question was then pending before the Kentucky Supreme Court in a companion case?

B. Relying upon a Kentucky intermediate appellate court opinion in the companion case that was not final and could not be relied upon as authority under the controlling rules of the Kentucky Supreme Court?

C. Upholding a particular use of a loan receipt under the law of Kentucky where that use had been expressly forbidden by prior decision of the Kentucky appellate court of last resort?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties.

DESIGNATION OF CORPORATE RELATIONSHIPS

Bonded Elevator, Inc., filing this petition for certiorari as petitioner in this proceeding, states that:

This is its original designation of corporate relationships.

Bonded Elevator, Inc. is not owned by any parent corporation.

Bonded Elevator, Inc. does not have an ownership interest in any non-wholly owned subsidiaries.

Bonded Elevator, Inc. does not have any affiliates.

Dated: July 8, 1983.

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IN THE
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No.

BONDED ELEVATOR, INC. and
FRANK CORUM, Executor of the Estate
of Deceased Otto Corum - - *Petitioners*

v.

FIRST AMERICAN NATIONAL
BANK OF NASHVILLE - - - *Respondent*

**PETITION FOR CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

OPINIONS BELOW

The order/opinion of the Court of Appeals below (appendix I, *infra*, pp. 1a-3a) was not reported. The memorandum opinion of the District Court below (appendix I, *infra*, pp. 4a-6a) was not reported.

The order of the Supreme Court of Kentucky granting motion for discretionary review (appendix II, *infra*, p. 7a) was not reported.

JURISDICTIONAL GROUNDS IN THIS COURT

The order of the Court below (appendix I, *infra*, pp. 1a-2a), which is sought to be reviewed, was entered on February 2, 1983. Rehearing was denied by order entered on April 12, 1983 (appendix I, *infra*, p. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment, United States Constitution, which provides:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

2. The Tenth Amendment, United States Constitution, which provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

3. 28 U.S.C. §1652, which provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

A. Nature of The Case

The decision to be reviewed involves litigation initiated in the District Court by respondent, First American National Bank of Nashville ("Bank"), against petitioners, Otto Corum ("Corum") and Bonded Elevator, Inc. ("Bonded"), and against SLT Warehouse Company ("SLT"). The complaint alleged:

1. Failure by SLT to deliver grain collateral under its warehouse receipts and negligent loss of the grain collateral;

2. Failure by Corum to pay a guarantee of a promissory note with a principal balance of \$2,082,490.33, and interest to date of judgment of \$486,775.04, a total of \$2,569,265.37; and

3. Failure by Bonded to pay a promissory note with a principal balance of \$2,082,490.33, and interest to date of judgment of \$810,559.51, a total amount of \$2,893,049.84.

On December 20, 1980, SLT entered into an agreement with warehouseman's legal liability insurers (basic and excess) styled a "Loan Receipt and Agreement." By this document, the legal liability insurers purported to "loan" SLT \$2,350,000.00 conditioned upon SLT's agreement to immediately relend \$2,350,000.00 to Bank.

On December 22, 1980, SLT entered into an agreement with Bank. SLT purported to "loan" the Bank \$2,350,000.00.

On February 11, 1982, the District Court refused requested relief under Federal Rule of Civil Procedure 60(b) from final partial summary judgment for Bank against Corum entered on May 21, 1980, and from final partial summary judgment for Bank against Bonded entered on May 4, 1981.

B. Course of Proceedings

On December 13, 1978, Bank filed its suit in the District Court against Bonded, Corum and SLT.

On May 21, 1980, the District Court entered final summary judgment against Corum, *supra*, and further, dismissed Corum's counterclaim against the Bank.

On December 20 and 22, 1980, the insurers, SLT and Bank entered into the two-step loan scheme.

Also, on December 22, 1980, SLT and Bank entered into a stipulation dismissing Bank's complaint against SLT with prejudice. The order dismissing the complaint was entered on December 30, 1980.

By an opinion dated April 15, 1981, and by final partial summary judgment dated May 4, 1981, the District Court entered final partial summary judgment against Bonded, *supra*.

On June 22, 1981, Corum and Bonded first obtained access to some of the SLT/Bank settlement documents.

On July 30, 1981, Bonded and Corum moved, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from judgments entered against them.

On February 11, 1982, the District Court entered its memorandum opinion holding that it "would not be inclined to grant relief pursuant to 60(b) in this matter." The Court's disinclination was based upon the continued pendency of Corum and Bonded's cross-claims against SLT.

On February 19, 1982, Bonded and Corum filed their notice of appeal from the District Court's February 11, 1982, refusal of relief.

On July 9, 1982, the District Court entered its memorandum and order denying Corum's motion to stay proceedings to enforce judgment.

On July 15, 1982, Otto Corum died. On November 4, 1982, the District Court entered its order substituting Frank Corum, as executor of the estate of Otto Corum, as a defendant in the cases.

On June 1, 1982, Bonded and Corum moved the Court of Appeals to stay the appeal until determination by the Kentucky Court of Appeals of the identical issue of the validity under Kentucky law of a "loan receipt agreement" in a third party settlement context in a related case.

On June 18, 1982, the Court of Appeals denied Bonded and Corum's motion for stay.

On January 5, 1983, Bonded and Corum filed a suggestion to certify question of Kentucky law to the Supreme Court of the Commonwealth of Kentucky with the Court of Appeals. The basis for the suggestion was that the identical question of Kentucky law was presently pending before the Kentucky Supreme Court on a motion for discretionary review in the companion case of *Bonded Elevator, Inc. v. First National Bank of Louisville*, Kentucky Supreme Court file no. 82-SC-729-D.

On January 14, 1983, the Court of Appeals entered its order denying Bonded and Corum's "motion to certify question of Kentucky law to the Supreme Court of the Commonwealth of Kentucky," but did so "without prejudice to its being presented as part of the appellants' appeal."

On January 26, 1983, the appeal was argued before the Sixth Circuit and the suggestion that the question of Kentucky law be certified to the Supreme Court of Kentucky was once more advanced.

On February 2, 1983, the Court of Appeals entered its order affirming the judgment of the District Court below that permitted a settling co-defendant, SLT, to use a "loan receipt" fiction to secure and enforce plaintiff Bank's jural rights against the non-settling co-defendants, Corum and Bonded, when those jural rights would not otherwise have been available to the settling co-defendant.

On February 9, 1983, the Supreme Court of Kentucky granted discretionary review in the said related case of *Bonded Elevator, Inc. v. First National Bank of Louisville* (appendix II, *infra*, p. 7a), which case presented the same issues as were before the Court of appeals.

On February 16, 1983, Bonded and Corum filed their petition for rehearing and suggestion to certify question of Kentucky law to the Supreme Court of Kentucky with the Court of Appeals.

On April 12, 1983, the Court of Appeals entered its order denying Bonded and Corum's petition for rehearing and refusing to certify the question of Kentucky law to the Supreme Court of Kentucky.

C. Statement of the Facts

Bank's complaint alleged that Bonded had defaulted in its payment of a promissory note executed in the principal amount of \$2,500,000.00. The note was secured by warehouse receipts issued by SLT. The warehouse receipts represented grain owned by Bonded, but entrusted to and physically held by SLT, the field warehouseman, to secure the Bank for moneys ad-

vanced under loan agreement. Corum guaranteed payment of the loan.

On August 28 or 29, 1978, SLT, which had been aware of grain shortages since at least June or July of 1978, and possibly as early as March of 1978, finally informed Bank that substantially all of the grain collateral was missing.

On November 1, 1978, Bank gave notice to Bonded, SLT and Corum demanding payment of the note and accrued interest. SLT has never delivered the grain it was warehousing.

On December 20, 1980, the co-defendant, SLT, entered into an agreement with its warehouseman's legal liability insurers (basic and excess) styled a "Loan Receipt and Agreement."

On December 22, 1980, SLT entered into an agreement with Bank also styled a "Loan Receipt and Agreement."

On December 22, 1980, SLT and Bank entered into a stipulation dismissing Bank's complaint against SLT. Neither the Court nor counsel for Corum and Bonded was informed of any of the foregoing agreements until counsel for Corum and Bonded obtained copies of the two agreements on June 22, 1981.

The settlement scheme set out in the above agreement provided for a two-tier set of "loans." SLT's liability insurers "loaned" \$2,350,000.00 to SLT in the form of a non-interest bearing "loan" repayable "only in the event and to the extent of any actual net monetary recovery (of) SLT (from) . . . Bonded and Corum, . . ." The agreement between SLT and

Bank identically provided for the "loan" of \$2,350,000.00 by SLT to Bank. The non-interest bearing loan was "repayable only in the event and to the extent of any actual monetary recovery (Bank) may obtain (from) . . . Bonded (and Corum)."

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The District Court for the Western District of Kentucky had jurisdiction over this case under 28 U.S.C. §1332, Diversity of Citizenship.

REASONS FOR GRANTING WRIT

Introduction

This is a diversity case. It involves the application of the law of the Commonwealth of Kentucky. There are no factors requiring a uniform national rule. The Court of Appeals was "in effect" only another court of the Commonwealth of Kentucky. *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938); *Angel v. Bullington*, 330 U. S. 183 (1946); *Miree v. DeKalb County*, 433 U. S. 25 (1977). There was then and is presently pending in the Kentucky state courts a companion case to the present case. At the time the Court of Appeals rendered its decision, the companion case was pending in the Kentucky appellate courts.

The Court of Appeals based its decision upon a non-final "not to be relied upon" opinion of the Kentucky intermediate appellate court in the companion case. Rules 76.28(4) and 76.30(2)(d) of the Kentucky Rules of Civil Procedure.

The Court of Appeals not only violated the rules of the Kentucky Supreme Court by relying upon the non-final opinion, but refused to follow or cite the controlling Kentucky state court of last resort precedent.

The Supreme Court of Kentucky then granted discretionary review of the Kentucky intermediate appellate court decision in the companion case. Upon petition for rehearing and despite the grant of discretionary review of the companion case, the Court of Appeals refused to certify the identical question of law to the Kentucky Supreme Court.

These refusals are a denial to petitioners of due process of law under the doctrine of *Erie R. Co. v. Tompkins*, *supra*. The Court held in *Erie* that:

Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States the doctrine had prevented uniformity in the administration of the law of the state. 304 U. S. at 74-75.

This Court has held that the due process clause of the Fifth Amendment to the United States Constitu-

tion “. . . tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of the equality of application of the law.” *Truax v. Corrigan*, 257 U. S. 312, 332 (1921). See also *Hirabayashi v. United States*, 320 U. S. 81, 100 (1943); *Frontiero v. Richardson*, 411 U. S. 677 (1973); *Jiminez v. Weinberger*, 417 U. S. 628 (1974); and *Department of Agriculture v. Murry*, 413 U. S. 508 (1973). The Court in *Erie* went on to state that:

. . . We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

304 U. S. at 77-80. See the Tenth Amendment to the United States Constitution.

As pointed out by this Court in *Hanna v. Plumer*, 380 U. S. 460 (1965), the rule of *Erie v. Tompkins* is rooted in part in a realization that it would be unfair for the character or result of litigation materially to differ because suit had been brought in a federal court. The twin aims of *Erie v. Tompkins* are: discouragement of forum shopping and avoidance of inequitable administration of the law.

28 U.S.C. §1652, *supra*, provides that the laws of the several states shall generally be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply. This Court has held

that under the requirement of this section, federal courts must follow state law in deciding state questions and that it is inadmissible that there should be one rule of state law for litigants in state court, and another rule for litigants who bring the same question before a federal court owing to circumstances of diversity of citizenship. *Fidelity Union Trust Company v. Field*, 311 U. S. 169 (1940), *reh. denied*, 311 U. S. 730, *reh. denied*, 314 U. S. 709. As held by the Court of Appeals in *Petersen v. Chicago Great Western R. Co.*, 138 F.2d 304 (8th Cir. 1943), a federal court is required to follow the same substantive rules in diversity cases that a state court would have applied in the particular case. The accident of diversity of citizenship may not operate to disturb equal administration of justice in coordinate state and federal courts. *Id.*

Federal court dockets are crowded. There *may* be valid reasons to limit diversity jurisdiction. There *are* valid reasons that there be no diversity in the application of law to facts solely because of the election to use a federal or state forum. This would inevitably result in a torrent of new federal cases, whether by election of the plaintiff or removal by the defendant.

The Court of Appeals' refusal to follow the then-controlling precedent of the Kentucky court of last resort and reliance upon a non-final opinion of an intermediate appellate court can only encourage forum shopping.

With the identical issue pending before the Supreme Court of Kentucky in a companion case, it is

difficult to conceive of justification for refusing to stay or certify. It would result in uniformity. It would prevent simple injustice.

The determination of whether the refusal to defer to the state court is a departure from the holding of *Erie*, from the principles of comity, and from the accepted and usual course of judicial proceedings, can be analytically assisted by the examination of the three questions presented.

If this record demonstrates petitioners' contentions, then there are special and important reasons for review. *Supreme Court Rule* 17.1. It is respectfully suggested that the departures from the accepted and usual course of judicial proceedings demonstrate compelling reasons for review. *Supreme Court Rule* 17.1(a).

Did the Court of Appeals Depart from the Accepted and Usual Course of Judicial Proceedings and Deny Petitioners Due Process of Law by:

A. Refusing to Certify to the Kentucky Supreme Court the Determinative Question of State Law When the Identical Question Was Then Pending Before the Kentucky Supreme Court in a Companion Case?

The Kentucky Supreme Court has adopted a procedure for certification of questions of Kentucky law "by the Supreme Court of the United States [or] any Court of Appeals of the United States." Ky.R.Civ.P. 76.37. This procedure has been utilized and approved by the Court of Appeals below in *Union Light, Heat & Power Company v. U. S. District Court*, 588 F. 2d 543 (6th Cir. 1978). The Court of Appeals there stated that:

This rule should serve to allow this Court to insure that no Federal Court interpretation of Kentucky law in these cases becomes final before a final decision on the same issue by the Supreme Court of Kentucky. 588 F. 2d at 544.

The question of Kentucky law before the Court of Appeals was whether a series of loans could be used to obtain the jural rights of a third party to be enforced against another third party. This arrangement violates the Kentucky high court's last pronouncement on loan receipts in *Biven v. Charlie's Hobby Shop*, Ky., 500 S.W.2d 597 (1973), *infra*, being merely an indirect attempt to accomplish what was forbidden directly in that case.

Whether or not the Kentucky courts will continue to be controlled by the holding in *Biven* is presently pending before the Kentucky Supreme Court in the companion case of *Bonded Elevator, Inc. v. First National Bank of Louisville*, *supra*. Discretionary review was granted in this case by the Kentucky Supreme Court on February 9, 1983. A motion for discretionary review by the Kentucky Supreme Court ". . . is a matter of judicial discretion and will be granted only when there are *special reasons* for it." Ky.R.Civ.P. 76.20 (emphasis supplied).

Briefing was completed in the companion state court case on April 26, 1983. Oral argument was heard on June 30, 1983. The decision by the Kentucky Supreme Court will be forthcoming in the near future. In its order of April 12, the Court of Appeals acknowledged that it was the "determinative issue in

the present appeal.” If the Kentucky Supreme Court continues to follow *Biven* and reverses its intermediate appellate court, there will be a *direct conflict in companion cases between the state and federal courts* although the federal system is bound to apply state law. This is the unjust result held unconstitutional in *Erie Railroad Company v. Tompkins*, 304 U. S. 64 (1938). Bonded and Corum moved the Court of Appeals to certify this question of Kentucky law to the Supreme Court of Kentucky on January 5, 1983, January 26, 1983, and *February 16, 1983, after the state Supreme Court grant of discretionary review.*

The Seventh Circuit was faced with a very similar question in *Wecker v. Kilmer*, 471 F.2d 782 (1972). The question presented was whether a physician who is not a party to a general release in regard to injuries sustained in an Indiana automobile accident was entitled to benefit of the release, although he paid no part of the consideration. The Court of Appeals found that the question was one of Indiana law, that the answer would determine the appeal, and that there were no clear controlling precedents in the decisions of the Supreme Court of Indiana. The Court of Appeals held that:

[A]ccordingly this is an appropriate question to be certified to that Court pursuant to appellate rule 15(N) effective November 15, 1972. *Id.* at 783.

The Fifth Circuit was faced in *Maryland Casualty Company v. Hallatt*, 326 F.2d 275 (1964), with a situation where it had decided a case based on Florida law. Subsequently “the Florida court categorically

and by name rejected the opinion of this Court and specifically adopted the dissenting opinion as correctly enunciating the law of Florida.” When the case came up before the Fifth Circuit on appeal from remand that Court of Appeals was afforded an opportunity to correct itself. The Court stated that:

The Court has jurisdiction of and will correct an initial opinion where as here, between the date of the initial decision and the time we are again called upon to pass upon the same case, a controlling state court has made a decision that we were ‘dead wrong.’ The Florida Court in *Barnes* has saved us from committing a miscarriage of justice. We are not insensible to possible complications but are of the opinion that under the total circumstances it is our duty to conform our decision to the supervening decision of the State Court, such decision being under *Erie* the right decision. *Id.* at 277.

This Court has lent its approval to certification of state law questions in diversity cases to state supreme courts in *Lehman Brothers v. Schein*, 416 U. S. 386 (1974). The Court there observed that “the dissenter on the Court of Appeals urged that that Court certify the state law question to the Florida Supreme Court as is provided in Fla. Stat. Ann. §25.031 and its Appellate Rule 4.61. That path is open to *this Court* and to any Court of Appeals of the United States. 478 F.2d, at 828. We have, indeed, used it before, as have Courts of Appeal.” 416 U. S. at 389 (footnotes omitted).

This Court stated that such a certification procedure “does, of course, in the long run save time, energy,

and resources and helps build a cooperative judicial federalism.” 416 U. S. at 391. *This Court* then vacated the judgment of the Court of Appeals and remanded for reconsideration whether the controlling issue of Florida law should be certified to the Florida Supreme Court pursuant to Rule 4.61 of the Florida Appellate Rules. *Id.*

It is respectfully submitted that this Court should review the Court of Appeals refusal and remand the matter for reconsideration of or certification of the question. Alternatively, it is respectfully suggested that this Court should, upon review, itself utilize the Kentucky certification procedure available to it to determine the important and determinative issue of Kentucky law. *Aldrich v. Aldrich*, 375 U. S. 249 (1963); *Dresner v. City of Tallahassee*, 375 U. S. 136 (1963).

Did the Court of Appeals Depart from the Accepted and Usual Course of Judicial Proceedings and Deny Petitioners Due Process of Law by:

B. Relying Upon a Kentucky Intermediate Appellate Court Opinion in the Companion Case That was Not Final and Could Not be Relied Upon as Authority Under the Controlling Rules of the Kentucky Supreme Court?

In holding that the attempted extension of the “loan receipt” fiction was neither partial satisfaction nor champertous, and therefore denying Bonded and Corum relief from the judgments against them, the Court of Appeals reasoned in its February 2, 1983, order that:

These arguments were made to the Kentucky Court of Appeals in the related cases of *Bonded Elevator, Inc. v. First National Bank of Louisville*, 82-CA-960-MR and 82-CA-822-MR, decided August 23, 1982. The Kentucky Court of Appeals rejected each of the arguments and upheld the loan transaction. We find this clear expression of law by the appellate court, which is in agreement with the views of the experienced district judge sitting in Kentucky, to be compelling.

On February 9, 1983, the Supreme Court of Kentucky granted discretionary review in the said related cases.

The Court of Appeals' reliance, in its February 2 opinion, *supra*, and in its April 12, 1983 denial of the hearing, upon the Kentucky Court of Appeals' decision of *Bonded Elevator, Inc.*, was misplaced.

Prior to and after oral argument, *Bonded and Corum* suggested to the Court of Appeals that:

(a) A motion for discretionary review was pending before the Kentucky Supreme Court in a related *Bonded Elevator, Inc.* case, *supra*, and was ultimately granted;

(b) The Kentucky Court of Appeals decision in that related case was, therefore, not final (citing Ky.R.Civ.P. 76.30);

(c) The question of the limits to the use of the loan receipt fiction has serious import for Kentucky jurisprudence and has either been decided contrary to

the District Court's decision herein by *Biven, infra*, or is undecided;

(d) Uniformity between the decision by the Court of Appeals in the Kentucky Supreme Court on this question should be obtained; and

(e) The question should, therefore, be certified to the Kentucky Supreme Court (citing Ky.R.Civ.P. 76.37).

The law of Kentucky is that an opinion of the Kentucky Court of Appeals is not final pending a motion for a grant of discretionary review to the Kentucky Supreme Court. Ky.R.Civ.P. 76.30(2)(d) states in pertinent part that:

Unless otherwise ordered . . . in no event shall an opinion become final pending final disposition of . . . a timely motion under Rule 76.20 [for discretionary review] . . . (emphasis and parenthetical supplied.)

Reliance on such a non-final opinion is expressly forbidden in Kentucky.

The non-final, unpublished opinion of the companion case is not authority and may not be relied upon as authority. *Yocum v. Justice*, Ky. App., 569 S. W. 2d 678, 679 (1977). *Yocum* holds:

The purpose of this opinion is to serve notice upon the Bar, generally that in future cases in which unpublished opinions are cited, we will entertain motions to strike the offending counter-statement and if the circumstances warrant, deny leave to refile.

In accord is *Jones v. Commonwealth of Kentucky*, Ky. App., 593 S. W. 2d 869, 871 (1969).

In addition to its failure to exercise sound discretion in advancing judicial efficiency and federal comity, *supra*, the Court of Appeals erred in relying upon a non-final Court of Appeals decision which Kentucky law makes perfectly clear should not be relied upon. It is respectfully submitted that this Court should grant review for purposes of reversal of this error.

Did the Court of Appeals Depart from the Accepted and Usual Course of Judicial Proceedings and Deny Petitioners Due Process of Law by:

C. Upholding a Particular Use of a Loan Receipt Under the Law of Kentucky Where That Use Had Been Forbidden by Prior Decision of the Kentucky Appellate Court of Last Resort?

SLT's "loan receipt" agreement with Bank required:

1. Bank to dismiss with prejudice its claims against SLT;

2. Bank to repay SLT, without interest, only to the extent of its recovery from Bonded, *or any other person*;

3. Bank not to settle with Bonded or Corum or any related person (without approval of SLT);

4. Bank to cooperate fully with SLT in Bank's claims against Bonded and Corum, ". . . *all such proceedings to be prosecuted, settled, or dismissed, at*

the risk and expense, including attorneys' fees, of SLT and under SLT's exclusive direction, management and control"; and

5. *Bank's appointment of SLT as agent and attorney-in-fact of Bank.* SLT now controls Bank in this litigation and has had such control under its "loan receipt agreement" since December 22, 1980.

By operation of Kentucky law, Bank's judgment against Bonded has been satisfied to the extent of the payment by SLT. Even though there are two defendants to Bank's claim, there is the right of only one recovery.³

The twin pillars of modern loan receipt law in Kentucky are *Aetna Freight Lines, Inc. v. R. C. Tway Company, Ky.*, 298 S. W. 2d 293 (1956) and *Biven, supra*.

The holding of *Tway* is that loan receipts are permissible where an *insurance company* has made a purported loan to its *insureds* to avoid jury prejudice

³*O'Bryan v. Peterson*, Ky. App., 563 S. W. 2d 732, 735 (1978); *W. R. Grace & Company v. Hargadine*, 392 F. 2d 9, 18 (6th Cir. 1958); *Koster's v. Southern Opt. Co.*, 595 F. 2d 347, 355, 356 (6th Cir. 1979); *Coleco Industries, Inc. v. Berman*, 567 F. 2d 559 (3d Cir. 1977), *cert. den.*, 439 U. S. 830 (1978); *reh. denied*, 439 U. S. 998 (1978). See also dissenting opinion of Chief Justice Reed in *Sanderson v. Hughes*, Ky., 526 S. W. 2d 308, 309 (1975). See also Professor Kenneth B. Germain's Kentucky Law Survey of Remedies, 64 Ky.L.J. 245, 246 (1975) where it is pointed out that it is: "a . . . basically 'equitable' principle that the plaintiff was entitled to but one compensation for his loss, and that satisfaction of this claim, even by a stranger to the action, would prevent its further enforcement. [*Prosser*, §48, at 299.] Today, the 'one cause of action' rule has fallen into disrepute, whereas the 'one satisfaction' rule is still in good standing."

against insurance companies. This was not the *purpose* of the second-tier "loan receipt" agreement fiction between SLT and Bank. Its purpose was to enable SLT to recover its payment to Bank from Bonded without an adjudication of the cross-claims, and their defenses, of the two co-defendants.

This prejudicially changes jural relationships. This was neither attempted by the parties in *Tway* nor authorized by *Tway*.

Biven is the most recent pronouncement on the subject by the Kentucky appellate court of last resort. It holds that a purported loan by a liability insurance carrier to a *third party claimant* is not a "loan" but is a payment. The *Biven* facts are as follows: Davis accidentally shot and killed Biven. Biven sued Davis. Davis' liability carrier entered into a loan receipt agreement with Biven. Biven secured the loan by pledging to the liability carriers all claims against other third parties. Biven, under the control of Davis' liability carrier, then brought suit against the seller and manufacturer of the pistol, alleging that it was defective. On these facts the Kentucky court refused to permit the use of the fictional language of the loan receipt to permit the liability insurer to step into the shoes of the claimants.

The Court found:

We, therefore, hold that the loan receipt constitutes *nothing other than a release* and it was valid for such purpose. (Emphasis supplied.) 500 S. W. 2d at 599.

SLT is not an insurer. Bank is not an insured. The warehouse receipt agreement is not an insuring agreement. The prejudice-against-insurance-company rationale is simply not present.

Unless the Supreme Court of Kentucky is prepared to reverse *Biven*, Bank's fictional loan is nothing more than a partial settlement.

Biven clearly forbids SLT's insurers from employing the loan receipt fiction in a payment to Bank directly. SLT's insurers have therefore attempted to accomplish the same thing indirectly. The fact that SLT's insurers thereby took over the cause of an unrelated third-party plaintiff, Bank, not their insured, to pursue against their insured's, SLT's, co-defendants, thereby circumventing cross-claims and defenses, is the motivation for the attempt.

This two-step "loan receipt" fiction is, of course, no more of a "loan" than the more direct attempt to take over the plaintiff's cause against co-defendants forbidden by *Biven*. It is not saved by any legitimate excuse for a "loan receipt" fiction, such as avoiding undue jury prejudice. It is subject to exactly the same objections and infirmities as the *Biven* "loan receipt."

It is significant that, although repeatedly cited to them by Bonded and Corum, neither the District Court, in its memorandum opinion, nor the Court of Appeals, in its orders denying Bonded and Corum relief from judgment, made any reference whatsoever to this controlling Kentucky high court case of *Biven*.

Law journals considering the matter have commended the Kentucky court's approach in *Biven*. For example, in *Loan Agreement: A Settlement Device That Deserves Close Scrutiny*, 10 Val. U. L. Rev. 231, 239-40 (1976), the author extolled the Kentucky Court's treatment of "loan receipts" as follows:

. . . One approach has been to recognize the label, loan receipt agreement, as a mere fiction, and to decide if the equities in the given case justify the use of a fiction. For instance, the Kentucky Supreme Court in *Aetna Freight Lines, Inc. v. R. C. Tway Company*, expressly recognized that the difference between a loan under a loan receipt and an absolute payment under a policy is a mere fiction. But the context in which the loan receipt originated was decisive.

The plaintiff had borrowed from his own liability insurer, essentially the same context in which the fiction was validated by *Luckenbach*. The Court upheld the transaction as a valid loan on two grounds: (1) *no party would be prejudiced by use of the fiction*, and (2) the insurer should be protected from jury bias.

Seventeen years after the *Tway* decision, the Kentucky Supreme Court again expressly recognized loan receipts as a fiction, but this time denied their validity as a loan. The determinative factor was a change in factual context. *Tway* involved an insured and an insurer. The later Kentucky Supreme Court decision involved a loan receipt agreement between a plaintiff and one of two potentially liable tortfeasors. Commerce would not be facilitated, nor was there any contractual obliga-

tion to provide indemnity to the plaintiff by the co-defendant. The needs which originally gave rise to the fiction were not present in the plaintiff/co-tortfeasor area Hence, where any party is prejudiced by the use of a fiction or where public policy is contravened, the fiction should be prohibited.

Similarly, at 56 Ky. L. J. 540-41 (1978), the Kentucky Law Survey emphasized the limitations *Biven* established for toleration of the "loan receipt" fiction as follows:

It is common practice for insurance companies to settle first-party claims with their own insureds, then subrogate against a third-party tortfeasor.⁶⁷ Because of the natural prejudice juries often exhibit against insurance companies, the companies devised the 'loan receipt' method of settling with their own insureds. By this fiction, the company only loans the money to the insured who is then required to repay it from proceeds he might obtain in the suit against the third party. This allows the insurance company to finance the suit against the third party but bring it in in the name of its insured. This method of litigating subrogation claims has been approved in Kentucky.⁶⁸ However, the fiction is tolerated only insofar as the facts surrounding the settlement will support a 'loan' theory. *Thus, in the 1973 case of Biven v.*

⁶⁷See, e.g., *State Farm Mut. Auto. Ins. Co. v. Roark*, Ky., 517 S. W. 2d 737 (1974); *New York Underwriters Ins. Co. v. Louisville & N.R.R.*, Ky., 148 S. W. 2d 710 (1941).

⁶⁸*Ratcliff v. Smith*, Ky., 298 S. W. 2d 18 (1957); *State Farm Mut. Auto. Ins. Co. v. Hall*, Ky., 155 S. W. 2d 838 (1942).

Charlie's Hobby Shop,⁶⁹ a 'loan receipt' was not allowed when the insurance company making the settlement was not the insurer of the injured party, both rather the insurer of another defendant.⁷⁰ (emphasis supplied)

⁶⁹Ky., 500 S. W. 2d 597 (1973).

⁷⁰Note, however, that the insurance carrier of one joint tortfeasor, after having made settlement with the injured party, is subrogated to its insured's right to contribution from the other joint tortfeasor. *Automobile Club Ins. Co. v. Department of Highways*, Ky., 414 S. W. 2d 578 (1967); *Leitner v. Hawkins*, Ky., 223 S. W. 2d 988 (1979).

This is precisely the same relationship present in this case. The policy of promoting settlements is defeated by this extension of the legal fiction. The extension of loan receipts into the area of co-defendant plaintiff settlements *does not* simplify complex litigation or promote settlement. Just the contrary is the case. As pointed out by Thornton and Wick, *Loan Receipt Agreements: Are They Loans, Settlements, Wagering Contracts or Unholy Alliances?* Ins. Couns. J. 226, 228 (April, 1976):

Not only does the non-settling defendant find himself hemmed in by his enemies, but the existence of the Loan Receipt diminishes his chances of affecting settlement with the plaintiff. The fact that the plaintiff is now well funded tends to put him in a litigious frame of mind, and the hope of recovering his loan payment insures that the settling defendant will encourage the plaintiff to push ahead with the litigation. Those courts which have found justification for Loan Receipt Agreements in the policy of the law that favors

settlement of legal controversies, fails to take account of the ultimate effect of these agreements. While their immediate result is settlement between the plaintiff and one of the defendants, Loan Receipt Agreements tend to promote, rather than discourage, litigation with a non-settling co-defendant.

See also 32 S.W.L.J. at 785-786; Scoby, *Loan Receipts and Guaranty Agreements*, 10 Forum 1300, 1313 (1975); and 10 Val. U.L.Rev. 251-52.

If the purported loan receipt is not construed as a release, then it is champertous, void, and SLT's payment satisfied Bank's judgment in whole or in part. The *Biven* court prevented the liability insurers there from buying the third-party plaintiff's cause of action by judicially rewriting the purported loan receipt.

In considering the ethics of "Gallagher" agreements,⁵ a "settlement" device analogous to loan receipts, an increasing number of writers, and the one court which has squarely addressed the issue, have recognized them as champertous.

The Nevada Supreme Court held in *Lum v. Stinnett*, 87 Nev. 402, 488 P. 2d 347 (1971), that since the "loan receipt" agreements were motivated by the par-

⁵*Richfield Oil Corporation v. LaPrade*, 56 Ariz. 100, 105 P. 2d 1115 (1940). "Outside Arizona, Gallagher-type agreements are known as 'Mary Carter' agreements . . ." 19 Ariz. L. Rev. 863, 865 (1977). Mary Carter, Gallagher and loan receipt agreements used in a plaintiff co-defendant settlement context are all non-judicial devices for limiting the exposure of one defendant at the expense of another. 25 DePaul L. Rev. 792 (1976).

ties' insurance companies, which were "strangers to the action," the agreements were champertous.

It is not difficult to imagine the potential ethical violations involved in such a "loan receipt" practice if the Kentucky high court had not already ruled in *Biven* that such "loans" are invalid from their inception and are to be treated as partial releases and satisfactions.⁶ By so holding, the Court in *Biven* expressly avoided the necessity of holding that the "loan receipt" agreement was champertous. 500 S. W. 2d at 599.

CONCLUSION

It is respectfully submitted that the accident of Bank's diversity of citizenship should not cause Bonded and Corum to suffer a different, adverse result regarding the validity of the attempted extension of the "loan receipt" fiction under Kentucky law, from the results obtained by Bonded in the related case before the Kentucky courts. Under *Erie*, the Federal Courts must apply the Kentucky law already announced in *Biven* and anticipated to be reiterated by the Kentucky Supreme Court in the companion case.

⁶See *Stinnett, supra*, where the Court held the attorneys to be guilty of such ethical violations. See also the Arizona Bar's ethical pronouncement that third-party loan receipts violate the Code of Professional Responsibility. Finally, see the Kentucky Supreme Court's Rule 3.130 and the American Bar Association Code of Professional Responsibility, Ethical Considerations 5-1 and 7-28, and Disciplinary Rules 1-102(A) 4 and 5, regarding representation of conflicting interests, candor, fairness, and taking improper advantage over an adversary or technical advantage over opposing counsel. These are all serious ethical matters implicated by a scheme of third-party loan receipts.

This Court should review this case because of the failure of the Court of Appeals and the District Court to decide the matter according to the controlling authority of the state high court, or, alternatively, so that the matter may be remanded to the Court of Appeals for reconsideration of the certification procedure, or so that it may be certified directly by this Court to the Kentucky Supreme Court for a resolution of any doubts about the controlling state law. Failure to review will, very likely, in light of the Kentucky Supreme Court's grant of discretionary review in the related case presenting the identical issue, result in a failure of equal administration of justice in coordinate state and federal courts.

Respectfully submitted,

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No. 82-5110

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FIRST AMERICAN NATIONAL BANK
OF NASHVILLE - - - - *Plaintiff-Appellee*

v.

BONDED ELEVATOR, INCORPORATED, et al. - *Defendants*
BONDED ELEVATOR, INCORPORATED and
FRANK CORUM, Executor of the Estate
of Deceased Otto Corum - *Defendants-Appellants*

ORDER—Filed February 2, 1983

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge;
and PECK, Senior Judge.

In this diversity case we are required to apply the substantive law of Kentucky. The defendants Bonded Elevator, Incorporated and Otto Corum appeal from an order entered by the district court on February 11, 1982, denying the motion of the appellants for relief pursuant to Rule 60(b), F. R. Civ. P., from partial summary judgments previously entered against them.

On appeal the defendants contend that Kentucky law prohibited the use of a transaction by which a co-defendant in the district court, SLT Warehouse Company, purported to loan to the plaintiff First American National Bank of Nashville, \$2,350,000 which it had obtained from its liability insurers pursuant to a "Loan Receipt and Agreement." The defendants argue that the loan receipt is a release and the payment to the bank satisfied its judgments, and al-

ternatively, if the loan receipt is not a release it is champertous and void. These arguments were made to the Kentucky Court of Appeals in the related cases of *Bonded Elevator, Inc. v. First National Bank of Louisville*, NOS. 81-CA-960-MR and 82-CA-822-MR decided August 23, 1982. The Kentucky Court of Appeals rejected each of the arguments and upheld the loan transaction. We find this clear expression of law by the appellate court, which is in agreement with the views of the experienced district judge sitting in Kentucky, to be compelling.

The partial summary judgments entered by the district court on February 4, 1980 and May 21, 1980, and the order of the district court denying the motion for relief pursuant to Rule 60(b) entered on February 11, 1982, are affirmed. The cause is remanded to the district court for prompt trial of the remaining issues.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

No. 82-5110

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FIRST AMERICAN NATIONAL BANK
OF NASHVILLE - - - - - *Plaintiff-Appellee*

v.

BONDED ELEVATOR, INCORPORATED, et al. - *Defendants*

BONDED ELEVATOR, INCORPORATED and
FRANK CORUM, Executor of the Estate
of Deceased Otto Corum - *Defendants-Appellants*

ORDER—Filed April 12, 1983

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge;
and PECK, Senior Circuit Judge.

Upon receipt and consideration of the petition for rehearing filed herein by the appellants Bonded Elevator, Inc. and Otto Corum and the court ordered response thereto filed by the appellee First American National Bank of Nashville, the court concludes that rehearing is not required. The grant of discretionary review by the Supreme Court of Kentucky in a case decided by the Kentucky Court of Appeals involving, *inter alia*, the determinative issue in the present appeal is not cause for this court to withdraw its earlier decision and certify a question to the Supreme Court of Kentucky.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

UNITED STATES DISTRICT COURT**WESTERN DISTRICT OF KENTUCKY
AT PADUCAH****Civil Action No. 78-0145-P**

FIRST AMERICAN NATIONAL BANK OF NASHVILLE - *Plaintiff**v.*

BONDED ELEVATOR, INCORPORATED,

OTTO CORUM and

SLT WAREHOUSE COMPANY - - - *Defendants*

MEMORANDUM OPINION

This matter is before the Court on motions of Defendants Bonded Elevator, Inc. and Otto Corum requesting that a determination be made as to whether the Court would be inclined to grant relief, pursuant to Fed. R. Civ. P. 60(b), from summary judgments entered against each moving defendant. Both Bonded and Corum have appealed the judgments against them and, thus, if the Court is inclined to grant relief, Bonded and Corum could request the Sixth Circuit Court of Appeals to remand their case. *See First National Bank of Salem, Ohio v. Hirsch*, 535 F. 2d 343 (6th Cir. 1976). Plaintiff First National Bank has responded to defendants' motion, defendants have replied, and further discovery and briefing have transpired. Bonded and Corum also move to compel production of documents by First American and Defendant SLT Warehouse Company.

Bonded and Corum's claim for relief centers upon a loan receipt agreement executed between SLT and its insurers, and a subsequent loan receipt agreement between SLT and

First American. It is the contention of Bonded and Corum that due to the nature and true intent involved in these transactions, no *loan* has been extended to First American, but indeed the result has been the satisfaction of any judgment rendered in favor of the Bank. In response, the Bank has emphasized the validity of these transactions as a legitimate technique recognized under Kentucky law.

A motion requesting relief under Rule 60(b) is addressed to the discretion of the Court, *Marshall v. Monroe & Sons, Inc.*, 615 F. 2d 1156 (6th Cir. 1980); *H. K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F. 2d 1115 (6th Cir. 1976); *Jacobs v. DeShelter*, 465 F. 2d 840 (6th Cir. 1972); *Douglass v. Pugh*, 287 F. 2d 500 (6th Cir. 1961); 7 Moore's *Federal Practice* ¶60.19; Wright & Miller, *Federal Practice and Procedure*: Civil §2857, 2863; and here it must be noted that both Bonded and Corum have been adjudged to be liable to the plaintiff under the promissory note and guaranty; moreover, there is no indication that the Bank will make a double recovery on its claim as it is required to repay SLT if the Bank recovers from Bonded or Corum. See *Sunderland v. City of Philadelphia*, 575 F. 2d 1089 (3d Cir. 1978). Finally, the cross-claims of Bonded and Corum are still very much alive and thus means for the determination of their ultimate liability in this matter are available to them. As stated by First American,

There is nothing in the Loan Receipt and Agreement that will in any way affect the determination of the issues in this action between Bonded, Corum and SLT. There is no basis for Bonded's assertion that the Loan Receipt and Agreement permits "SLT to flank the defenses and set-offs Corum and Bonded have to SLT" or that it was used for the purpose of "obscuring the legal relationship between SLT and Corum and between SLT and Bonded The cross-claims between Bonded, Corum and SLT are still

pending before this Court. Nothing in the Loan Receipt and Agreement adversely affects or obscures the relationships between SLT and Corum and between SLT and Bonded or the issues between them in this case, including the issue as to which party is responsible for the missing grain. As stated in the Court's order of dismissal of the Bank's complaint against SLT, "All other matters are reserved."

Memorandum of Plaintiff First American in Opposition to Defendants' Motion for Relief from Judgment, pp. 41-42.

Given these considerations, the Court would not be inclined to grant relief pursuant to 60(b) in this matter.

Due to the Court's ruling on this matter, it is deemed unnecessary to address the motions to compel presently made by Bonded and Corum.

DATED: February 10, 1982.

(s) Edward H. Johnstone
Judge
United States District Court

SUPREME COURT OF KENTUCKY

82-SC-729-D

(81-CA-960-MR & 82-CA-822-MR)

BONDED ELEVATOR, INC. - - - - - *Movant*

v.

FIRST NATIONAL BANK OF LOUISVILLE - *Respondent*

Jefferson Circuit Court

#81-CA-960-MR & #82-CA-822-MR

**ORDER GRANTING MOTION FOR
DISCRETIONARY REVIEW**

The motion of Bonded Elevator, Inc. for a review of the decision of the Court of Appeals is granted.

The clerk of the Court of Appeals is directed to transfer to the clerk of the Supreme Court the entire records in this proceeding, File Nos. 81-CA-960-MR & 82-CA-822-MR.

Stephens, C.J., Aker, Leibson, Stephenson, Vance and Wintersheimer, J.J., sitting.

(s) Robert F. Stephens
Chief Justice

ENTERED February 9, 1983.